No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR, PETITIONER

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Court should overrule *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer* v. *Robbins*, 519 U.S. 452 (1997).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 869 F.3d 1360. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 20a-25a) is unreported but is available at 2016 WL 337517.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2017. A petition for rehearing was denied on January 31, 2018 (Pet. App. 44a-46a). On April 24, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 29, 2018, and the petition was filed on that date. The petition for a writ of certiorari was granted on December 10, 2018. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions are reproduced in the appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

A. Historical Background

1. In *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), this Court addressed the meaning of a regulation issued under the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23. The regulation required manufacturers of building materials to charge prices no higher than (i) the "highest price which the seller *charged to a purchaser* of the same class for delivery * * * *during March, 1942*," (ii) the highest offering price "[i]f the seller made no such delivery during March 1942," or (iii) in the absence of deliveries or offers, an adjusted price based on other goods. 7 Fed. Reg. 7957, 7968-7969 (Oct. 8, 1942) (emphases added). The Seminole Rock & Sand Company delivered crushed stone in March 1942 under a 1941 contract, at a price of $0.60 per ton. *Seminole Rock*, 325 U.S. at 412. The Administrator of the Office of Price Administration, who had issued the regulation, contended that the first clause of the price regulation therefore applied. *Ibid.* The manufacturer, in contrast, contended that, under clause (i), "there must be *both a charge and a delivery* during March," and that the delivery at $0.60 per ton did not qualify because the "charge" for that delivery had occurred when the price was fixed in the 1941 contract. Resp. Br. at 8, *Seminole Rock*, *supra* (No. 914).

This Court held that clause (i) applied. That holding principally rested on the "plain words of the regulation." *Seminole Rock*, 325 U.S. at 414. As the Court "read the regulation," clause (i) "clearly applie[d]," *id.*

at 415, because, by its terms, "[t]he essential element bringing the rule into operation is * * * the fact of delivery during March," *id.* at 416. The Court further stated that, "[s]ince this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt," *id.* at 413-414, and "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation," *id.* at 414. It thus explained that "[a]ny doubts concerning this interpretation * * * are removed by reference to the administrative construction," as reflected in a public bulletin the Administrator had distributed, his report to Congress, and consistent practice in "the countless explanations and interpretations given to inquirers affected by this type of maximum price determination." *Id.* at 417-418.

2. In 1946, one year after *Seminole Rock*, Congress enacted the Administrative Procedure Act (APA), ch. 324, 60 Stat. 237 (5 U.S.C. 551 *et seq.*, 701 *et seq.*). The APA has two provisions relevant to this case. First, Section 706 specifies the scope of judicial review of agency action, where available. Under that provision, "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. 706; see § 10(e), 60 Stat. 243. Second, the APA generally requires agencies to engage in notice-and-comment procedures before promulgating a rule, but it exempts "interpretative rules" from those requirements. See 5 U.S.C. 553(b) and (c); § 4(a) and (b), 60 Stat. 239. The statute does not define "interpretative rule," but a hallmark of such a rule is that it "'do[es] not have the force and effect of law,'"

unlike a rule promulgated after notice and comment. *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (citation omitted).

3. This Court did not apply *Seminole Rock* again for two decades after the APA's enactment. In *Udall* v. *Tallman*, 380 U.S. 1 (1965), the Court addressed a dispute over the meaning of two orders concerning public lands in Alaska, see *id.* at 5, 17. The orders barred the "sale" or "other disposition" of the lands, but the Secretary of the Interior had interpreted them not to prohibit granting oil and gas leases. *Id.* at 19 (citation omitted). The Court deferred to the Secretary's interpretation, explaining that it "may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation" and "courts must therefore respect it." *Id.* at 4 (citing *Seminole Rock*, 325 U.S. at 413-414). The Court emphasized that the Secretary's interpretation had "been a matter of public record" and that "almost the entire area covered by the orders in issue has been developed, at very great expense, in reliance upon the Secretary's interpretation." *Id.* at 17-18.

In the ensuing years, the Court invoked *Seminole Rock* and *Tallman* with increasing frequency in a wide variety of contexts (as did the lower courts), including to defer to agency interpretations given privately or in litigation and sometimes without significant textual analysis of the underlying regulation. See, *e.g.*, *Thorpe* v. *Housing Auth. of the City of Durham*, 393 U.S. 268, 276 & nn.22-23 (1969) (deferring to an agency's view as expressed in letters to third parties); *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977) (stating that the Court "need not tarry" over the language of the regulations in light of *Seminole Rock*); *Gardebring* v. *Jenkins*,

485 U.S. 415, 429-430 (1988) (deferring to an agency's view as expressed for the first time in litigation).[1]

Of particular note, in *Auer* v. *Robbins*, 519 U.S. 452 (1997), this Court applied *Seminole Rock* to defer to the Secretary of Labor's understanding, expressed in an amicus brief filed in this Court, of a regulation implementing the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* The FLSA exempts employers from paying overtime to "bona fide executive, administrative, or professional" employees. 29 U.S.C. 213(a)(1). The Secretary's regulations defined those terms to require that the exempt employee be paid "on a salary basis." 29 C.F.R. 541.1(f) (1996). The regulations specified that an employee is paid "on a salary basis" only if the employee receives a regular "predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. 541.118(a) (1996).

In *Auer*, a group of police sergeants and a lieutenant contended that they were not paid on a salary basis (and

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[1] See also, *e.g.*, *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 94-95 (1995); *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); *Stinson* v. *United States*, 508 U.S. 36, 44-45 (1993); *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-190 (1991); *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 358-359 (1989); *Mullins Coal Co.* v. *Director, Office of Workers' Comp. Programs*, 484 U.S. 135, 159 (1987); *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986); *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 158 n.13 (1982); *Blanding* v. *DuBose*, 454 U.S. 393, 401 (1982) (per curiam); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980); *Northern Ind. Pub. Serv. Co.* v. *Porter Cnty. Chapter of the Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975) (per curiam); *Ehlert* v. *United States*, 402 U.S. 99, 105 (1971); *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969).

therefore were entitled to overtime) because "their compensation could be reduced for a variety of disciplinary infractions" under police department policy—making it "'subject to reduction'" based on the quality of their work, even if no reductions were actually made. *Auer*, 519 U.S. at 455, 460. The United States, participating in the case at this Court's invitation, explained that the Secretary interpreted the phrase "'subject to reduction'" to mean subject to reduction "as a practical matter," not merely theoretically, and therefore the police officers were not entitled to overtime. U.S. Amicus Br. at 21, *Auer*, *supra* (No. 95-897) (U.S. *Auer* Br.).

This Court deferred to the Secretary's interpretation as expressed in the amicus brief. *Auer*, 519 U.S. at 461. The Court stated that, "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Ibid.* (quoting, indirectly, *Seminole Rock*, 325 U.S. at 414). In the Court's view, that "deferential" standard was "easily met" because the phrase "'subject to' comfortably bears the meaning the Secretary assigns." *Ibid.* The Court rejected the petitioners' argument that deference to an amicus brief was unwarranted, explaining that "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462.[2]

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[2] The Court has since applied *Auer* in numerous cases. See, *e.g.*, *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 613 (2011); *Chase Bank USA, N. A.* v. *McCoy*, 562 U.S. 195, 208-210 (2011); *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U.S. 261, 274-275 (2009); *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 328 (2008); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007); *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 387-388 (2003).

B. The Present Controversy

1. The Department of Veterans Affairs (VA) administers a program to provide monetary benefits to veterans who become disabled as a result of their military service. See 38 U.S.C. 301(b), 1110, 1131; *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011). In adjudicating claims for benefits, the VA is charged with resolving "all questions of law and fact necessary to a decision." 38 U.S.C. 511(a). Claims for benefits are received and processed by a VA regional office, which renders an initial decision. See *Henderson*, 562 U.S. at 431. A veteran who is dissatisfied with the regional office's decision may seek de novo review by the Board of Veterans' Appeals (Board), a component of the VA. See *ibid.*; see also 38 U.S.C. 301(c)(5), 7101 *et seq.*

A claimant who is dissatisfied with the Board's decision may appeal to the United States Court of Appeals for Veterans Claims (Veterans Court), an Article I court that has exclusive jurisdiction to review decisions of the Board. 38 U.S.C. 7252, 7266. Any party may in turn appeal to the Federal Circuit. 38 U.S.C. 7292(a). In reviewing the Veterans Court's decisions, the Federal Circuit has jurisdiction to "decide all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. 7292(d)(1).[3]

2. This case arises from administrative proceedings on petitioner's claim for veterans benefits for post-traumatic stress disorder (PTSD)—a disability for which VA regulations require a claimant to show, among other

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[3] That language parallels 5 U.S.C. 706. This Court has indicated that, in using the same language, Congress intended the Federal Circuit's scope of review of "relevant questions of law" to be the same as under Section 706. See *Shinseki* v. *Sanders*, 556 U.S. 396, 406-407 (2009); cf. S. Rep. No. 418, 100th Cong., 2d Sess. 60 (1988).

things, "medical evidence diagnosing the condition." 38 C.F.R. 3.304(f); see 38 C.F.R. 4.126 (1983) (requiring a diagnosis to substantiate any claimed mental condition).

a. Petitioner served in the Marine Corps from 1962 to 1966 and fought in the Vietnam War. Pet. App. 2a, 4a. In 1982, he filed a claim for disability benefits for PTSD. J.A. 6-9. The evaluating psychiatrist at the time noted that petitioner was involved in a "major ambush which resulted in 13 deaths" in his company "during Operation Harvest Moon." J.A. 11-12. After considering these and other facts, the psychiatrist diagnosed him with "an emotional disturbance and personality disorder" but found that he "does not suffer from PTSD." J.A. 13, 14. In 1983, the VA regional office denied petitioner's PTSD claim because it was "not shown by evidence of record." J.A. 15 (capitalization altered); cf. 38 C.F.R. 4.127 (1983) ("[P]ersonality disorders will not be considered as disabilities[.]"). Petitioner filed a notice of disagreement, but the denial became final after he failed to perfect the appeal. Pet. App. 3a.

b. In 2006, petitioner moved to reopen his claim. Pet. App. 4a; J.A. 16-17. Under 38 C.F.R. 3.156(a), a claimant may "reopen a finally adjudicated claim by submitting new and material evidence."[4] Here, petitioner provided a 2007 psychiatric evaluation diagnosing him with PTSD (J.A. 29-40), and a VA examiner confirmed that

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[4] On February 19, 2019, a revised version of 38 C.F.R. 3.156(a) took effect. See 84 Fed. Reg. 2449 (Feb. 7, 2019); 84 Fed. Reg. 138, 169 (Jan. 18, 2019). All citations in this brief refer to the version of the regulations in effect in 2018, unless otherwise noted. Section 3.156 was also amended in 2006, but those changes had no bearing on the proceedings. See Pet. App. 40a. Similarly, various statutory changes effective February 19, 2019, do not apply to this case. See Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105; 84 Fed. Reg. at 2449.

diagnosis. Pet. App. 4a. The VA regional office reviewed petitioner's submissions, along with the evidence submitted with his original claim, and granted his claim for benefits effective June 5, 2006—the date the agency had received petitioner's motion to reopen. J.A. 41-43; see 38 C.F.R. 3.400(q)(2) (providing that the effective date of an award based on new and material evidence other than service records, received after a final disallowance, is the "[d]ate of receipt of new claim or date entitlement arose, whichever is later").

c. Petitioner appealed to the Board to challenge the effective date of the award. J.A. 47-48. The Board observed that petitioner's original claim had been denied in 1983 "because he did not have a diagnosis of PTSD" at that time. Pet. App. 30a. It explained that June 5, 2006, the date of receipt of his motion to reopen his claim, was the "earliest effective date" allowable for his award of benefits. *Id.* at 33a.

The Board noted that, as an alternative to seeking to reopen his prior claim, petitioner might have instead sought reconsideration of his claim under 38 C.F.R. 3.156(c)(1). Pet. App. 39a-40a. That provision states that the VA will reconsider a claim after a final decision if it receives "relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim." 38 C.F.R. 3.156(c)(1). If the VA reconsiders—rather than reopens—a claim, the effective date of the new award is generally "the date entitlement arose or the date VA received the previously decided claim, whichever is later." 38 C.F.R. 3.156(c)(3).

The Board concluded, however, that the only two additional service records at issue were not "relevant" to the original denial of his claim in 1983 and therefore did not warrant reconsideration. Pet. App. 42a. The first

document was a page of personnel records, which petitioner submitted in 2006, noting that he "participated in Operation 'Harvest Moon'" in 1965. J.A. 19 (capitalization altered); see J.A. 16. The second document, located by a VA official in 2007, was an "extract from the daily log" of petitioner's battalion, summarizing Operation Harvest Moon. J.A. 21-22. As noted above, however, in 1983 the evaluating psychiatrist was well aware of petitioner's participation in Operation Harvest Moon; petitioner's claim had instead been denied by the VA "because there was no diagnosis of PTSD." Pet. App. 42a.

3. The Veterans Court affirmed. Pet. App. 20a-25a. Petitioner contended that the Board had "failed to consider or apply the provisions of § 3.156(c)." *Id.* at 23a (citation omitted). The court explained, however, that the Board had considered Section 3.156(c)(1) and had found the newly submitted service department records "were not relevant" to the denial of his claim in 1983. *Id.* at 23a-24a. The documents would not have changed "the outcome of the" agency's 1983 decision, which was based on the lack of "a diagnosis of PTSD," not on any dispute about whether petitioner had "engaged in combat with the enemy during service." *Id.* at 24a (brackets and citation omitted).

4. The court of appeals also affirmed. Pet. App. 1a-19a. Petitioner contended that the Board had mistakenly interpreted the term "relevant official service department records" in 38 C.F.R. 3.156(c)(1) to mean "records that countered the basis of the prior denial." Pet. App. 12a (citation omitted). In his view, prior service records are "relevant" within the meaning of the regulation as long as they are probative of "any fact that is of consequence to the determination of the action." *Id.* at 13a (citation and emphasis omitted). The records at

issue here, he argued, were relevant to other criteria for establishing a compensable disability. See *ibid.*

The court of appeals rejected petitioner's reading of the VA's regulation. See Pet. App. 14a-19a. After reciting the standard for *Seminole Rock* deference, see *id.* at 15a, the court stated that it found the term "relevant" to be ambiguous because the regulation "does not specify whether 'relevant' records are those casting doubt on the agency's prior rating decision, those relating to the veteran's claim more broadly, or some other standard." *Id.* at 15a; see *id.* at 16a-17a. In light of that perceived ambiguity, the court viewed the "only remaining question" to be "whether the Board's interpretation of the regulation is 'plainly erroneous or inconsistent' with the VA's regulatory framework." *Id.* at 17a (citation omitted). The court concluded that the Board's interpretation was not plainly erroneous. *Ibid.* It also concluded that the two additional records at issue were not relevant under that interpretation of the regulation. *Id.* at 17a-18a. Indeed, the additional records "detailing his participation in Operation Harvest Moon were superfluous to the information already existing in his file," including the 1983 psychiatric report that "expressly recounted how [petitioner] experienced" a major ambush during that operation. *Ibid.* The court also noted that petitioner himself "d[id] not urge that the 2006 records provide[d]" the missing diagnosis. *Id.* at 18a.

The court of appeals denied rehearing en banc, over the dissent of three judges. Pet. App. 44a-46a.

SUMMARY OF ARGUMENT

I. The doctrine of judicial deference to agency interpretations of ambiguous regulations announced in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410

(1945), and applied in *Auer* v. *Robbins*, 519 U.S. 452 (1997), should be clarified and narrowed.

A. The doctrine raises significant concerns. First, its basis is unclear. It is not well grounded historically; this Court has not articulated a consistent rationale for it; and it is more difficult to justify on the basis of implicit congressional intent than *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Second, *Seminole Rock* deference is in tension with the APA's distinction between legislative and interpretive rules. Interpretive rules, unlike legislative rules, do not carry the force and effect of law and are exempt from notice-and-comment procedures. When a reviewing court gives controlling weight to an interpretive rule under *Seminole Rock*, it arguably treats the interpretive rule as though it were a legislative rule. *Seminole Rock* deference can also cause practical hardship to regulated parties.

B. In light of these substantial concerns, the Court should impose and reinforce significant limits on *Seminole Rock* deference. *Seminole Rock* deference is inappropriate if, after applying all the traditional tools of construction, a reviewing court determines that the agency's interpretation is unreasonable—*i.e.*, not within the range of reasonable readings left open by a genuine ambiguity in the regulation. A more searching application of that inquiry would obviate any occasion for *Seminole Rock* deference in many cases. And even when that rigorous predicate is met, a reviewing court should defer to the agency's interpretation only if the interpretation was issued with fair notice to regulated parties; is not inconsistent with the agency's prior views; rests on the agency's expertise; and represents the agency's considered view, as distinct from the views of mere field officials or other low-level employees.

II. As appropriately limited, however, *stare decisis* counsels against overturning *Seminole Rock* and *Auer* in their entirety.

A. Several reasons counsel against altogether discarding *Seminole Rock* deference. First, Congress remains free to amend the APA and alter *Seminole Rock* if it wishes. Second, *Seminole Rock* deference has been a feature of administrative law for decades and has been invoked in many decisions. Regulated parties have reasonably relied on those settled precedents to arrange their affairs. Overruling *Seminole Rock* deference would thus upset private reliance interests to a greater degree than narrowing it. Third, overruling *Seminole Rock* deference would impose practical costs by eliminating or lessening the benefits of the doctrine. *Seminole Rock* deference promotes political accountability for regulatory policy and national uniformity in federal law. It also respects the scientific and technical expertise of agencies and, when appropriately limited, fosters certainty and predictability by making agency guidance more reliable for regulated parties.

B. Petitioner has not identified sufficient special justifications to warrant overruling *Seminole Rock* deference. The tension between the APA and *Seminole Rock* has existed for many years. The Court has applied the doctrine on numerous occasions, and petitioner does not argue the doctrine has proven unworkable. Petitioner's contention that the doctrine violates separation-of-powers principles is also incorrect. *Seminole Rock* deference does not result in any combination of legislative and judicial powers in the constitutional sense, because when an executive agency both makes and interprets rules, the agency exercises only executive power.

III. The judgment should be affirmed. Applying *Seminole Rock* to the regulation at issue, 38 C.F.R. 3.156(c), was unnecessary. The text, structure, and purpose of Section 3.156(c) make unambiguously clear that, to warrant reconsideration of the agency's previous denial of a claim for benefits, additional service records must be "relevant" to the basis for the agency's previous denial. The two additional service records at issue here did not meet that standard and indeed were irrelevant. The agency denied petitioner's prior claim in 1983 because he lacked a diagnosis of PTSD. It is undisputed that the two additional records at issue here did not speak to that dispositive defect in petitioner's claim; they instead merely confirm his combat experience, which was never in dispute.

ARGUMENT

Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer* v. *Robbins*, 519 U.S. 452 (1997), have come to stand for a degree of deference to agencies that lacks a clear historical basis and that raises significant concerns under the APA. In light of those concerns, the Court should impose and reinforce limits on *Seminole Rock* deference to cabin the doctrine's excesses. Appropriately limited in those ways, *Seminole Rock* and *Auer* should not be overruled altogether. Deference has governed judicial review of agency interpretations of regulations for more than half a century (including the entirety of the APA's existence). Overruling *Seminole Rock* and *Auer* could call into question the thousands of precedents that rely on them, including many of this Court's decisions, to a greater degree than narrowing them; private parties may have relied on those decisions to order their affairs. *Seminole Rock* deference also has

practical benefits, including promoting political accountability for regulatory policy and national uniformity in federal law.

I. *SEMINOLE ROCK* AND *AUER* SHOULD BE CLARIFIED AND NARROWED

Under *Seminole Rock* deference in its current form, "when the language of [a] regulation is ambiguous," *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 588 (2000), a reviewing court gives "controlling weight" to an administrative interpretation of the regulation unless the interpretation "is plainly erroneous or inconsistent with the regulation," *Seminole Rock*, 325 U.S. at 414; cf. *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (describing *Seminole Rock* as requiring deference "to the Secretary's interpretation unless an 'alternative reading is compelled by the regulation's plain language'") (quoting *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988)). This Court has stated that affording deference to an agency's interpretation respects the agency's "historical familiarity" with the regulations and its "policymaking expertise." *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 153 (1991). But this Court has never reconciled *Seminole Rock* deference with the APA or with pre-APA practice. *Seminole Rock* deference has also been applied in ways that raise practical concerns and that suggest the doctrine should be limited in several significant respects.

A. *Seminole Rock* Deference Raises Serious Concerns

Deference under *Seminole Rock* raises two concerns. First, the basis for *Seminole Rock* deference is unclear, and this Court has not examined its consistency

with the APA. The doctrine lacks a well-established basis in pre-APA practice and is difficult to fully justify on the basis of an agency's insight into its own intentions or congressional delegation. Second, *Seminole Rock* deference is in tension with the APA's critical distinction between legislative and interpretive rules.

1. The basis for Seminole Rock *deference is unclear*

a. Before *Seminole Rock*, this Court had deferred on occasion to an agency's interpretation of its own regulations. See, *e.g.*, *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 143 n.6 (1940); *AT&T Co.* v. *United States*, 299 U.S. 232, 241-242 (1936); *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 324-325 (1933). But "few cases" addressed the issue, and this Court did not defer in some instances where a *Seminole Rock*-type rule would have required doing so. Frank C. Newman, *How Courts Interpret Regulations*, 35 Cal. L. Rev. 509, 520-522 (1947).

The lack of a clear historical basis for *Seminole Rock* is evident in the decision itself. The Court did not invoke any of its prior decisions in announcing that an agency's interpretation should be given "controlling weight" unless "plainly erroneous." 325 U.S. at 414. For his part, the Administrator of the Office of Price Administration (whose regulation was at issue) had argued for deference primarily on the basis of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), decided just one year earlier. There, the Court had deferred to an agency's interpretation of a statute while emphasizing that the agency's interpretation was "not controlling" and received deference because it had the "power to persuade." *Id.* at 140. In *Seminole Rock*, the Administrator argued that "[t]he weight to be given to his construction of his own regulations should obviously be much

greater; for then he is explaining his own intention, not that of Congress." Pet. Br. at 20, *Seminole Rock*, *supra* (No. 914). But the Administrator did not argue that his interpretation was binding. See *id.* at 20-21 (observing that *Pottsville Broadcasting*, *supra*, had stated that an administrative interpretation of a regulation may be "'binding upon the courts,'" but arguing that the Court need not "go that far here") (citation omitted).

It is therefore far from clear that the Congress that enacted the APA would have been familiar with *Seminole Rock* deference as that doctrine now exists. To be sure, *Seminole Rock* was decided a year before the enactment of the APA. See p. 3, *supra*. But the decision post-dated much of the reform process that led to the APA, including the multi-volume study of administrative procedure commissioned by the Attorney General. See *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), *reprinted in Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) (*APA Final Report*); see also Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 Va. L. Rev. 219, 224-226 (1986). No discussion of the decision appears in the legislative record. And in a criminal case decided a month before the APA's enactment, this Court interpreted a price-control regulation without relying on *Seminole Rock* or suggesting that any deference to the Administrator's construction was warranted. See *M. Kraus & Bros., Inc.* v. *United States*, 327 U.S. 614, 621-623 (1946).

Accordingly, although the APA's scope-of-review provision—now found in relevant part at 5 U.S.C. 706—was understood to be a "restatement" of existing law, it is not clear that Congress was restating *Seminole Rock*

deference as that doctrine is understood today. *Administrative Procedure Act: Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. 39 (1946); accord S. Rep. No. 752, 79th Cong., 1st Sess. 38 (1945) ("restates the law governing judicial review"); *id.* at 44 ("declares the existing law"); U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 108 (1947) (*APA Manual*) ("restates the present law"). Existing law at the time permitted judicial review, "in some instances at least, [to] be limited to the inquiry whether the administrative construction is a permissible one," as the Attorney General's committee reported after its exhaustive study of pre-APA administrative procedure. *APA Final Report* 78; see *id.* at 90-91 ("[W]here the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body."). But permitting some degree of deference to an agency did not require affording its interpretations of its regulations "controlling" weight.

b. Nor has this Court articulated a consistent rationale for *Seminole Rock*. At times, the Court has suggested that *Seminole Rock* deference is based on an agency's superior insight into the intention behind its regulations—as the Administrator himself argued in *Seminole Rock*, see pp. 16-17, *supra*. See, *e.g.*, *Mullins Coal Co.* v. *Director, Office of Workers' Comp. Programs*, 484 U.S. 135, 159 (1987) ("In the end, the Secretary's view is * * * strongly supported by the fact that Labor wrote the regulation."). That intentionalist theory may be relevant where an interpretation is issued contemporaneously with the regulation, including, for example, as part of a final rule's published preamble. But beyond that, it is in significant tension with the Court's interpretive approach in other contexts, where the Court's "inquiry begins with the * * * text" of a law

and "ends there as well" when the text is clear. *National Ass'n of Mfrs.* v. *Department of Defense*, 138 S. Ct. 617, 631 (2018) (citation omitted). And even when legislative history is relevant, the Court does not typically rely on post-enactment statements of what a previously enacted statute meant. See, *e.g.*, *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history * * * is not a legitimate tool of statutory interpretation.").

An intentionalist theory also fails to explain the breadth of *Seminole Rock* deference as currently applied. This Court has deferred to an agency's interpretation of a regulation even when the interpretation is rendered decades after a rule is promulgated, and even when the interpretation is inconsistent with the agency's prior views—both circumstances in which deference cannot necessarily be justified on the basis of the agency's insight into its own intention at the time of the underlying rulemaking. See, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 170-171 (2007) (deferring to an agency's interpretation despite inconsistency); *Auer*, 519 U.S. at 461-462 (deferring to an agency's 1996 interpretation of a regulation adopted in 1954); cf. U.S. *Auer* Br. 6 (regulatory history).

c. This Court has also, at times, sought to ground *Seminole Rock* in the same kind of theory underlying *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). It is not clear, however, that the *Chevron* rationale applies to deference to an agency's construction of its own regulations.

This Court has stated that the *Chevron* framework rests on a presumption that "a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); see

National Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (*Brand X*) ("*Chevron* established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'") (quoting *Smiley* v. *Citibank (S.D.), N. A.*, 517 U.S. 735, 740-741 (1996)). As a corollary, when an agency fails to use the procedures Congress intended the agency to use to resolve a statutory ambiguity, *Chevron* deference generally does not apply. *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001).

Thus, when a reviewing court defers to an agency's interpretation under *Chevron*, it can be viewed as having "decide[d] [the] relevant question[] of law," 5 U.S.C. 706, by determining that the statute delegates discretion to the agency to resolve the ambiguity. See *City of Arlington* v. *FCC*, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting) ("We do not ignore [Section 706's] command when we afford an agency's statutory interpretation *Chevron* deference; we respect it."); cf. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 622 & n.58 (1996) (Manning); Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 27-28 (1983). In deciding legal questions, the court must take account of Congress's implicit instruction to review the agency's interpretation with a degree of deference.

In *Martin*, *supra*, this Court suggested that *Seminole Rock* deference can be viewed as resting on a similar presumption about congressional intent. There, the Court considered whether, in a dispute over the meaning

of workplace-safety regulations, a reviewing court should defer to the views of the Secretary of Labor or the Occupational Safety and Health Review Commission. 499 U.S. at 150. Under the statutory scheme, the Secretary promulgates the regulations, but the Commission adjudicates disputes about them. See *id.* at 147-148. The Court sided with the Secretary, reasoning that in authorizing the Secretary to make rules, Congress intended also to "delegate[] interpretive lawmaking power to the [Secretary] rather than to [a] reviewing court." *Id.* at 153.

The Court explained that "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin*, 499 U.S. at 151 (citing *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566, 568 (1980)). The Court further explained that the Secretary has "identifiable structural advantages" in interpreting the regulations—such as "historical familiarity" with the scheme; "policymaking expertise" developed over time; and the ability, as a "single administrative actor," to be "politically 'accountable for the overall implementation'" of the regulatory program. *Id.* at 152-153 (citation omitted); cf. *Thomas Jefferson Univ.*, 512 U.S. at 512.

Martin thus suggests that if a regulation that Congress has authorized an agency to promulgate is ambiguous, Congress should generally be presumed to have intended the agency's interpretation of the regulation to govern—*i.e.*, that the agency's "delegated lawmaking powers" imply also a presumptive "power" to issue "authoritative[]" interpretations. 499 U.S. at 151. And if Congress has conferred such an implied authority on an

agency, a reviewing court could be viewed as "decid[ing] [the] relevant question[] of law," 5 U.S.C. 706, in determining that Congress has instructed the court to review the agency's interpretation deferentially.

Justifying *Seminole Rock* deference on the basis of such a presumption, however, is more difficult than with respect to *Chevron* for reasons the Court did not address in *Martin*. Under *Chevron*, an ambiguity in a statute is understood to be an implicit delegation from Congress to the agency to make a policy judgment within the bounds of any statutory ambiguity. But an ambiguity in an agency's own regulation is not of Congress's making. Cf. *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part). *Martin* did not ground its presumption of congressional intent on statutory ambiguity, but rather more generally on the Secretary's delegated rulemaking authority. See 499 U.S. at 151-153. Moreover, as discussed below, Congress generally required notice-and-comment procedures under the APA for rules that carry the force of law. It is therefore far from clear that Congress intended courts to accord binding deference to interpretive rules not promulgated through that process.

2. Seminole Rock *deference is in tension with the APA's distinction between legislative and interpretive rules*

Seminole Rock deference is also in tension with the APA's distinction between legislative rules, which have the force and effect of law, and interpretive rules, which do not. Affording *Seminole Rock* deference to an interpretive rule appears to undercut that distinction.

a. The APA generally "prescribes a three-step procedure" for rulemaking. *Perez* v. *Mortgage Bankers*

Ass'n, 135 S. Ct. 1199, 1203 (2015); cf. 5 U.S.C. 553(c), 556-557 (separate procedures for formal rulemaking). First, the agency must publish a "notice of proposed rule making * * * in the Federal Register." 5 U.S.C. 553(b). Second, "[a]fter notice" to the public, the agency must "give interested persons an opportunity to participate in the rule making through the submission of" comments. 5 U.S.C. 553(c). Third, the agency must "consider[] * * * the relevant matter presented" in comments and "incorporate in the rules adopted a concise general statement of their basis and purpose." *Ibid.* "Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'" *Mortgage Bankers*, 135 S. Ct. at 1203 (quoting *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302-303 (1979)).

The APA, however, exempts some rules from notice-and-comment requirements—including "interpretative rules." 5 U.S.C. 553(b)(A). The statute does not define the term "interpretative rule," or the more common variant, "interpretive rule." See *Mortgage Bankers*, 135 S. Ct. at 1204 & n.1. But a "critical feature of interpretive rules" is that, unlike legislative rules, interpretive rules "'do not have the force and effect of law.'" *Id.* at 1204 (quoting *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)). Their purpose is to "advise the public of the agency's construction of the statutes and rules which it administers." *Ibid.* (citation omitted).

b. *Seminole Rock* deference applies to guidance documents that would qualify as interpretive rules under the APA. See 5 U.S.C. 551(4) (defining a "'rule'" to include "the whole or a part of an agency statement of general or particular applicability and future effect designed to * * * interpret * * * law or policy"); see also Matthew C. Stephenson & Miri Pogoriler, Seminole

Rock's *Domain*, 79 Geo. Wash. L. Rev. 1449, 1483-1484 (2011) (noting that interpretive rules may "take the form of published guidance manuals," "letters to interested parties," "ad hoc memoranda or announcements," or "speeches by agency officials"; collecting examples). Those interpretive rules typically have not been subject to notice-and-comment rulemaking, with its attendant procedural safeguards and opportunity for public participation.

When a reviewing court affords *Seminole Rock* deference to an agency's interpretive rule, doing so arguably treats the interpretive rule as though it were a legislative rule. The agency is empowered to announce an interpretation of a legislative rule to which a reviewing court generally must defer, even if it does not reflect what the court would conclude is the best interpretation of the legislative rule. As a practical matter, giving *Seminole Rock* deference to an agency's interpretive rule means that the interpretive rule itself is specifying how regulated parties must conduct themselves in order to comply with the agency's legislative rule. Cf. *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) ("[I]f an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference."). And it is anomalous that interpretive rules about a *statute's* meaning are generally accorded no *Chevron* deference, see *Mead Corp.*, 533 U.S. at 229-231, whereas interpretive rules about a *regulation's* meaning are accorded *Seminole Rock* deference, even though the agency is

fully empowered to amend the regulation in accordance with notice-and-comment procedures.[5]

To be sure, the Court disagreed with this argument in dicta in a footnote in *Mortgage Bankers*, 135 S. Ct. at 1208 n.4, which held that an agency need not use notice-and-comment procedures to revise or amend an interpretive rule, *id.* at 1206. The regulated party argued that notice-and-comment procedures should be required for significant revisions to interpretive rules because "interpretive rules have the force of law" under *Auer*. *Id.* at 1208 n.4. The Court responded that "[e]ven in cases where an agency's interpretation receives *Auer* deference, * * * it is the *court* that ultimately decides whether a given regulation means what the agency says," and "*Auer* deference is not an inexorable command in all cases." *Ibid.* (emphasis added); cf. U.S. Reply Br. at 11-14, *Mortgage Bankers*, *supra* (No. 13-1041).

Those statements, however, were not necessary to the Court's holding, which instead turned on the APA's "categorical" exemption of all interpretive rules from notice-and-comment requirements. *Mortgage Bankers*,

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[5] When an agency interprets its regulations in adjudication (as the VA did here), the agency's interpretation can also receive *Seminole Rock* deference. See, *e.g.*, *Thomas Jefferson Univ.*, 512 U.S. at 510-511, 512; *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 358-359 (1989). Deferring to an agency's interpretation in those circumstances does not give any interpretive rule the effect of a legislative rule, but it presents the related concern that the agency may adopt an interpretation different from what a court would conclude is the best interpretation, without going through notice-and-comment procedures to amend the regulation. Accordingly, although the choice between adjudication and rulemaking is committed to the agency's discretion, see *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), the limits that the government urges the Court to impose or reinforce on *Seminole Rock* deference should apply generally to adjudications as well as to interpretive rules.

135 S. Ct. at 1206. The statements are also difficult to square with the logic of *Mead Corp.*, which held that whether Congress intended a given agency action "to carry the force of law" should be the guiding consideration in whether *Chevron* deference applies to the agency action. 533 U.S. at 221. The fact that a reviewing court "ultimately decides" whether to defer to an agency's interpretation, *Mortgage Bankers*, 135 S. Ct. at 1208 n.4, does not eliminate the seeming incongruity of giving controlling weight to an interpretive rule that is not meant to carry the force of law.

3. Overly broad deference to agency interpretations can have harmful practical consequences

Although agencies can use interpretive guidance to provide desirable clarity and certainty, often at the request of regulated parties, *Seminole Rock* deference can discourage agencies from engaging in notice-and-comment rulemaking. Even when a reviewing court declines to defer to the agency's interpretive guidance, regulated parties can be harmed by the uncertainty and costs that litigation over the validity of the interpretation may entail. See, *e.g.*, *Maryland Gen. Hosp., Inc.* v. *Thompson*, 308 F.3d 340, 343-346 (4th Cir. 2002) (rejecting an agency's interpretation of a Medicare reimbursement regulation, to which other courts had deferred, as inconsistent with the plain meaning of the regulation); 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.11, at 538-540 (5th ed. 2010) (Pierce) (collecting examples of agency interpretations rejected by reviewing courts as efforts to change the meaning of a legislative rule).

Seminole Rock deference has also sometimes operated to short-circuit judicial review by leading courts to

dispense with careful scrutiny of the text of a regulation. See, *e.g.*, *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977) (stating that the Court "need not tarry" over the language of the regulations because the agency's interpretation was controlling); *Ehlert* v. *United States*, 402 U.S. 99, 105 (1971) (declining to "take sides" in an interpretive debate because the agency's "reasonable, consistent[]" interpretation is controlling); pp. 47-50, *infra* (discussing the Federal Circuit's decision to apply *Seminole Rock* deference in this case after only cursory examination of the regulatory text). In practice, *Seminole Rock* has come to mean such a broad degree of deference to agency interpretations that courts have not always carefully examined whether there is genuine regulatory ambiguity in the first place.

B. *Seminole Rock* Deference Should Be Subject To Certain Prerequisites

Because *Seminole Rock* does not clearly flow from pre-APA history or the APA, the Court should impose and reinforce limitations on *Seminole Rock* deference—as it did for *Chevron* in *Mead Corp.*, see 533 U.S. at 229-231. *Seminole Rock* deference is appropriate only if the agency has reasonably interpreted any ambiguity; that standard should be no more solicitous to the agency than *Chevron*. And even if the regulation is ambiguous, the agency's interpretation should be given *Seminole Rock* deference only if certain threshold requirements are satisfied, including that the interpretation is not inconsistent with the agency's prior interpretations and otherwise provides regulated parties with fair notice, is sufficiently grounded in the agency's expertise, and represents the views of the agency itself (not merely low-level employees). Those limits are consistent with this Court's recent approach. See *Christopher* v.

SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (describing *Auer* deference as a "general rule" that "does not apply in all cases" and that "is undoubtedly inappropriate" in some circumstances). When those requirements are not met, the agency's interpretation is entitled to deference only to the extent it has the "power to persuade." *Skidmore*, 323 U.S. at 140; see *Christopher*, 567 U.S. at 159.

1. Courts should apply Seminole Rock *deference only after exhausting all the traditional tools of interpretation and determining that the agency has reasonably interpreted any genuine ambiguity*

Seminole Rock deference does not apply unless "the language of the regulation is ambiguous." *Christensen*, 529 U.S. at 588; see *Seminole Rock*, 325 U.S. at 414 (contemplating deference only "if the meaning of the words used is in doubt"). In determining whether a regulation is ambiguous, a reviewing court should—as in the *Chevron* context—apply all "the ordinary tools" of statutory and regulatory construction, including any canons of construction appropriate in the circumstances. *City of Arlington*, 569 U.S. at 296. A regulation is ambiguous in the relevant sense only if, "carefully considered" in light of all those tools, the regulation nonetheless "can yield more than one reasonable interpretation." *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting). A regulation is not ambiguous merely because "discerning the only possible interpretation requires a taxing inquiry." *Ibid.*; cf. *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (criticizing "reflexive deference").

To be sure, some genuine ambiguity is inevitable—for example, because an agency cannot foresee all the future applications of a rule at the time it issues the

rule. But many seeming ambiguities can be resolved by careful consideration of the text, structure, purpose, and history of a regulation. See, *e.g.*, *Decker*, 568 U.S. at 623-626 (Scalia, J., concurring in part and dissenting in part) (demonstrating how the regulation at issue there arguably was not ambiguous under the relevant canons of construction). A rigorous application of the tools of construction would obviate any need for *Seminole Rock* deference in many cases. Courts should instead strive where possible to give effect directly to an agency's legislative rule—the agency action that, under the APA, carries the force and effect of law.

Even if a reviewing court determines that an agency's regulation is ambiguous after exhausting all the traditional tools of construction, the court should defer to the agency's interpretation only if the agency's interpretation is "reasonable" in the sense that it falls within the zone of ambiguity identified. *Thomas Jefferson Univ.*, 512 U.S. at 515; see *Martin*, 499 U.S. at 150-151. At times, this Court has suggested that agency interpretations receive greater deference in this context than under *Chevron*. See, *e.g.*, *Larionoff*, 431 U.S. at 873; *Seminole Rock*, 325 U.S. at 414; cf. *Capital Network Sys., Inc.* v. *FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994) (understanding *Seminole Rock* to require "even greater deference" than *Chevron*). The Court should lay to rest any doubt and make clear that an agency's interpretation must be *reasonable*—*i.e.*, it must be one of the reasonable readings to which the regulation is susceptible even after applying the traditional tools of construction. Cf. *Global Tel*Link* v. *FCC*, 866 F.3d 397, 419 (D.C. Cir. 2017) (Silberman, J., concurring) (urging a "muscular" approach to the requirement under *Chevron* that an agency's interpretation be reasonable).

2. *Courts should apply* Seminole Rock *deference only if the agency's interpretation represents its fair, considered, and consistent judgment*

Seminole Rock deference is also unwarranted if "there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" *Christopher*, 567 U.S. at 155 (quoting *Auer*, 519 U.S. at 462). For example, a reviewing court need not defer to an interpretation that is merely a "*post hoc* rationalization[]" advanced in litigation challenging the agency action. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (citation omitted). The Court has not comprehensively set forth the circumstances in which an agency's interpretation should be viewed as not reflecting "the agency's fair and considered judgment." *Christopher*, 567 U.S. at 155 (citation omitted). But in the *Chevron* context, the Court has looked for indicia warranting such deference—such as relatively formal administrative procedures, like notice-and-comment rulemaking or adjudication. See *Mead Corp.*, 533 U.S. at 230. The Court should clarify that similar safeguards constrain the application of *Seminole Rock* deference.

a. *Consistency and fair notice.* This Court has recognized that "when [an] agency's interpretation conflicts with a prior interpretation," that inconsistency itself may suggest that the agency's present interpretation is not in fact its "'fair and considered judgment.'" *Christopher*, 567 U.S. at 155 (citing *Thomas Jefferson Univ.*, 512 U.S. at 515). The Court has also stressed administrative consistency as supporting deference. See, *e.g.*, *Decker*, 568 U.S. at 614 (concluding that an agency's "consistent" interpretation of its regulation, with "no indication that

[the agency's] current view is a change from prior practice," was "another reason" to accord deference); *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-190 (1991) ("[A]n agency's reasonable, *consistently held* interpretation of its own regulation is entitled to deference.") (emphasis added); *Northern Ind. Pub. Serv. Co.* v. *Porter Cnty. Chapter of the Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975) (per curiam) (deferring to a "consistently applied administrative interpretation") (quoting *Ehlert*, 402 U.S. at 105); *Seminole Rock*, 325 U.S. at 418 (deferring to a "consistent administrative interpretation"). The Court has, however, deferred on occasion to an agency's interpretation notwithstanding some inconsistency. See, *e.g.*, *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 296 & n.7 (2009); *Long Island Care*, 551 U.S. at 170-171; see also, *e.g.*, *Maine Med. Ctr.* v. *Burwell*, 775 F.3d 470, 480-481 (1st Cir. 2015); *Sierra Pac. Power Co.* v. *United States EPA*, 647 F.2d 60, 65 (9th Cir. 1981). *Seminole Rock* deference should be limited to interpretations that are not inconsistent with the agency's prior views.

Even when there is no express inconsistency, *Seminole Rock* deference should not apply when the agency adopts a novel interpretation that disrupts settled expectations based on agency acquiescence or contrary practice. In *Christopher*, for example, the Court declined to defer to an agency's interpretation that would have "impose[d] potentially massive liability" on regulated parties "for conduct that occurred well before that interpretation was announced." 567 U.S. at 155-156; see Pierce § 6.11, at 543-553 (additional examples of deference being denied for lack of fair notice). The interpretation at issue in *Christopher* followed a long period in

which the agency had appeared to acquiesce in a contrary interpretation, and the Court declined to defer to the agency's apparently new interpretation in those circumstances. See 567 U.S. at 158; see also *Mortgage Bankers*, 135 S. Ct. at 1208 n.4. Limiting *Seminole Rock* deference in the face of inconsistency would also better align the doctrine with pre-APA practices of judicial review, which stressed consistency (and judicial reluctance to upset the settled expectations that such consistency generates) as a reason for deference. See, *e.g.*, *Norwegian Nitrogen Prods.*, 288 U.S. at 315 (stating that a "consistent" administrative practice is entitled to deference). Relatedly, *Seminole Rock* deference to interpretations in guidance documents or adjudicatory opinions should be limited to such pronouncements that are readily available through familiar, official agency channels and thus that provide regulated parties with fair notice.

Finally, such limitations would help mitigate the tensions between *Seminole Rock* deference and the APA, see pp. 22-26, *supra*, because they would encourage agencies to effect significant policy changes through notice-and-comment procedures rather than guidance documents.[6] To be sure, an agency often has good reason to revise its interpretation of a legislative rule—*e.g.*, in light of additional experience with administering the rule, or because of changing market conditions—and the APA permits an agency to do so without notice-and-comment rulemaking, as long as the agency has a reasoned basis for the revision. See 5 U.S.C. 706(2)(A); *Mortgage Bankers*, 135 S. Ct. at 1209. Thus, the

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[6] Limiting *Seminole Rock* deference in this manner would also address petitioner's criticism (Br. 39-40, 52) that the doctrine is prone to abuse after changes in an agency's political leadership.

agency's authority to revise, alter, or reconsider its interpretation of its regulations is not at issue. The only question is whether the agency's new interpretation should receive binding deference. It should not when its interpretation is inconsistent with its prior views or fails to provide regulated parties with fair notice. In those circumstances, if agencies want their views to be accorded binding deference, they may utilize the APA procedures specifically designed to provide notice to, and allow participation by, regulated parties. In this respect *Seminole Rock* deference would be narrower than *Chevron*. See *Brand X*, 545 U.S. at 981. But *Chevron* generally applies only when an agency uses appropriately formal procedures to interpret a statute, see *Mead Corp.*, 533 U.S. at 229-230, and *Seminole Rock* deference lacks that requirement. Of course, if an agency revises its interpretation without notice-and-comment rulemaking and stands consistently by the revised interpretation over time, that interpretation would have a strong claim to deference under *Skidmore*. See 323 U.S. at 140.

b. *Agency expertise.* The Court has stated that *Seminole Rock* deference rests in part on an agency's "policymaking expertise," which "account[s] in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court." *Martin*, 499 U.S. at 153. A reviewing court therefore should not apply *Seminole Rock* deference if a particular interpretive dispute does not implicate the agency's expertise. Generally, agencies have a nuanced understanding of the regulations they administer. But when interpretive disputes happen to arise in which the agency's expertise is irrelevant, *Seminole Rock* deference should not apply. See, *e.g.*, *Gonzales* v. *Oregon*, 546 U.S. 243, 256-258 (2006)

(declining to apply *Seminole Rock* deference when an agency interprets a regulation that "merely * * * paraphrase[s] the statutory language"); *id.* at 268-269 (noting that the agency at issue lacked relevant expertise); *Jicarilla Apache Tribe* v. *FERC*, 578 F.2d 289, 292-293 (10th Cir. 1978) (similar, where the agency's interpretation of a regulatory term was based on concepts developed at common law).

c. *Agency authority.* Finally, the logic of *Seminole Rock* deference suggests that the doctrine should apply only when the *agency* has made a fair and considered interpretive judgment. A reviewing court may therefore conclude that *Seminole Rock* deference is unwarranted because a proffered interpretation was given by field officials or other low-level employees who cannot be said to speak for the agency—unlike, for example, the presidentially appointed officers who lead the agency or their delegates, its administrative boards, and other official organs of agency policy. Cf. *Mead Corp.*, 533 U.S. at 233 ("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting."). Limiting *Seminole Rock* deference in that manner would promote one of the most significant benefits of the doctrine—political accountability for regulatory policy, see pp. 39-40, *infra*—by encouraging agencies to issue interpretive guidance through procedures that ensure it represents the considered views of the agency.

II. APPROPRIATELY LIMITED, *SEMINOLE ROCK* AND *AUER* SHOULD NOT BE OVERRULED

Although the United States takes seriously the concerns about *Seminole Rock* deference, those concerns do not justify overruling the doctrine if it is limited

along the lines advocated above. Notwithstanding those criticisms, *Seminole Rock*—particularly in its core applications—provides certainty and stability to regulated parties who rely on agency guidance documents. And because *Seminole Rock* has been a feature of administrative law for decades, it has generated significant private reliance interests. As a result, while the United States believes that *Seminole Rock* should be cabined, more drastic changes should be left to Congress.

A. *Stare Decisis* Counsels Against Overruling *Seminole Rock* Deference

One consideration this Court has identified in weighing whether to overrule a precedent is whether Congress "remains free to alter" the prior decision through legislation. *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 799 (2014) (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989)). Adhering to precedent is also important "where reliance interests are involved." *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). Those considerations weigh against overruling *Seminole Rock* deference.

1. Congress could alter Seminole Rock *deference*

The principal policy argument petitioner advances is that *Seminole Rock* creates an incentive for an agency to "write substantive rules * * * vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." Pet. Br. 38 (citation omitted); see Manning 655-660. Petitioner and his amici fail to identify an example of a regulation that was purposefully drafted in vague terms because of *Seminole Rock*, and there are incentives that cut the other way. Agencies have an incentive to be clear to accomplish

their purposes and to ensure compliance with a regulatory scheme. But whether *Seminole Rock* deference has had any appreciable effect on the clarity of agency regulations is, at bottom, an empirical question that Congress is well situated to analyze and address.

Petitioner also contends (Br. 48) that *Seminole Rock* deference is entitled to less weight as a precedent because it has no "statutory * * * underpinning." But whether *Seminole Rock* is consistent with the APA as an original matter, the relevant point here is that Congress remains free to alter or eliminate the doctrine. Instead of doing so, Congress has enacted legislation authorizing rulemaking against the backdrop of *Seminole Rock*—including when Congress authorized the VA to promulgate the regulation at issue here, see Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, § 2(a), 105 Stat. 386 (38 U.S.C. 501). Moreover, this Court has applied *Seminole Rock* and *Auer* in dozens of cases (and the lower courts in thousands of cases) over the past 50-plus years—until recently with no suggestion that the practice is inconsistent with the APA. See pp. 4-6 & nn.1-2, *supra*. It would be odd if such a longstanding and oft-invoked doctrine were entitled to little *stare decisis* weight.

Petitioner further contends (Br. 48-50) that *Seminole Rock* deference is a "procedural" rule entitled to less respect as precedent. That contention is at odds with petitioner's own views. *Stare decisis* concerns are less significant for "procedural and evidentiary rules," *Payne*, 501 U.S. at 828, because those rules "do not govern primary conduct," *Alleyne* v. *United States*, 570 U.S. 99, 119 (2013) (Sotomayor, J., concurring). But as petitioner himself contends (Br. 36-37), *Seminole Rock* deference too affects the lawfulness of primary conduct by regulated parties, since, where applicable, it

governs the meaning of regulations that regulate primary conduct. The doctrine is thus unlike the precedent this Court overruled in *Pearson* v. *Callahan*, 555 U.S. 223 (2009), which governed only the sequence in which a reviewing court was required to address two legal questions bearing on claims of qualified immunity, see *id.* at 232—not whether to grant such immunity.

2. *Overruling* Seminole Rock *deference would upset significant private reliance interests*

Considerations of *stare decisis* are "at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne*, 501 U.S. at 828. This is such a case. *Seminole Rock* and *Auer* are now part of "a long line of precedents" reaching back for decades. *Bay Mills*, 572 U.S. at 798. They have been invoked in thousands of reported decisions in the federal courts. Private parties have ordered their affairs in reasonable reliance on that settled body of law. Overruling *Seminole Rock* deference could call into question those decisions and would invite litigants "to challenge even longstanding and judicially accepted agency interpretations on the ground that the interpretation, although reasonable, is not the most persuasive" one to a particular court. Scott H. Angstreich, *Shoring up* Chevron: *A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. Davis L. Rev. 49, 122 (2000).

The prospect of unsettling decisions based on *Seminole Rock* deference would loom particularly large in statutory regimes with private enforcement mechanisms. Many applications of *Seminole Rock* occur in that context, where private litigants have an incentive to stretch the boundaries of a regulation, and the agency's interpretation benefits a regulated party. See,

e.g., *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 613-614 (2011) (failure-to-warn action under state law, preempted by federal regulatory scheme); *Chase Bank USA, N. A.* v. *McCoy*, 562 U.S. 195, 201-202 (2011) (private action for damages under the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*); *Auer*, 519 U.S. at 455 (private action for unpaid overtime under the FLSA); *Long Island Care*, 551 U.S. at 164 (similar). In *PLIVA*, for example, this Court deferred to the understanding of the Food and Drug Administration (FDA) that its regulations require the manufacturer of a generic drug to label the drug with the same information approved by the agency for the equivalent brand-name drug, see 564 U.S. at 613-614—thus foreclosing a plaintiff's failure-to-warn suit based on alleged deficiencies in the generic drug's label. Private parties have no doubt made investment (property) and pricing (contract) decisions in reasonable reliance on that understanding of the regulatory scheme, which exempts generic manufacturers from certain tort liability to which brand-name manufacturers are subject. Overruling the doctrine would threaten to upend those and similar reliance interests.

Narrowing *Seminole Rock* deference, however, would be far less likely to upset settled reliance interests. It would retain the doctrine in its core applications—for example, when the agency announces its interpretation in advance in a widely available guidance document, as it did in *Seminole Rock* itself. The Court, moreover, has acknowledged in recent years that the doctrine "does not apply in all cases" and "is undoubtedly inappropriate" in some circumstances. *Christopher*, 567 U.S. at 155. Consequently, narrowing *Seminole Rock* deference would not present the same degree of reliance concerns as overruling it altogether, and would be con-

sistent with the path this Court has charted in other areas where it has narrowed but not overruled a precedent in light of experience. See, *e.g.*, *Arizona* v. *Gant*, 556 U.S. 332, 343 (2009) (vehicle searches incident to the arrest of an occupant).

3. Overruling Seminole Rock *deference would impose practical costs on courts and regulated parties*

Notwithstanding the criticisms of *Seminole Rock*, even its critics acknowledge that there are significant practical benefits to the rule. See, *e.g.*, Manning 616-617, 629-630. Specifically, *Seminole Rock* deference promotes political accountability, national uniformity, and predictability. It also respects the expertise that agencies can bring to bear in interpreting the complex regulatory schemes they administer. These practical benefits would be lost or diminished by overruling the doctrine. Cf. *Citizens United* v. *FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (observing that whether to overrule a precedent requires a "sober appraisal" of the "practical effects" of doing so) (citation omitted).

a. *Seminole Rock* deference promotes political accountability for regulatory policy by allocating certain policy-laden interpretive decisions to agencies, rather than judges. As this Court has recognized, the resolution of an ambiguity in an agency regulation "entail[s] the exercise of judgment grounded in policy concerns." *Thomas Jefferson Univ.*, 512 U.S. at 512 (citation omitted). Indeed, petitioner criticizes (Br. 3) *Seminole Rock* deference precisely because it permits agencies to "make a *policy* judgment" in choosing among reasonable readings of ambiguous regulations. Those judgments, properly constrained by the regulatory text and fair-notice requirements, are better left to officials in

the Executive Branch who are subject to the supervision of the President, who in turn is accountable to the Nation for the execution of the laws. See *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). A similar "sensitivity to the proper roles of the political and judicial branches" has long informed this Court's view of *Chevron* deference. *Pauley*, 501 U.S. at 696; see *Chevron*, 467 U.S. at 866 (concluding that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do").

Petitioner suggests (Br. 3) that overruling *Seminole Rock* would have the desirable effect of replacing these agency policy judgments with a judicial determination "about the best *legal* interpretation" of a regulation. But *Seminole Rock* deference, when properly circumscribed, applies only when a reviewing court has *already* employed the traditional tools of legal interpretation and there are multiple reasonable readings. In those circumstances, reasonable minds can disagree about the "best interpretation." Pet. Br. 22, 37. *Seminole Rock* deference also applies when an agency interprets a regulation that is phrased at a high level of generality, such as requiring particular conduct when "reasonable," "to the extent necessary," or "consistent with best practices." Specifying how to apply such an administrative standard to particular conduct is a task that is more appropriately performed by "administrators, not * * * judges." *Chevron*, 467 U.S. at 864.

b. *Seminole Rock* deference promotes national uniformity. Under *Seminole Rock*, a regulation that is susceptible of more than one reasonable reading will generally be given the same interpretation—the agency's—by courts throughout the country. See *Christopher*, 567 U.S. at 158 n.17 (explaining that deference reduces

"conflict in the [c]ircuit[]" courts) (citation omitted); *Ford Motor Credit Co.*, 444 U.S. at 568 (deferring to an agency interpretation in light of Congress's "decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation"); *APA Final Report* 14 ("The 94 Federal district and territorial courts are structurally incapable of the same uniformity in the application of law as a single centralized agency."). Overruling the doctrine would undermine that uniformity and invite a patchwork of conflicting interpretations in different courts.

Petitioner's suggestion (Pet. 3) that *Seminole Rock* deference is significant only in cases in which a particular reviewing court would otherwise reach a different judgment about the "best" interpretation is thus incomplete. Agencies must implement standards on a nationwide basis, and this Court can review only a small fraction of the decisions reviewing agency interpretations. Absent *Seminole Rock* deference, courts' disagreements over the best or fairest interpretation of an ambiguous text could significantly undercut the uniformity of federal law. Cf. *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019) ("It is not unheard-of for one fair-minded adjudicator to think a decision is obvious in one direction but for another fair-minded adjudicator to decide the matter the other way."). And an agency's ability to engage in additional rulemaking in response to conflicting judicial interpretations does not fully ameliorate this concern. For a variety of reasons, notice-and-comment rulemaking "often requires many years and tens of thousands of person hours to complete." Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*,

52 Admin. L. Rev. 547, 550-551 (2000). Rulemaking cannot practicably be used as a routine way of correcting errant district-court decisions.

c. *Seminole Rock* deference recognizes the scientific and technical expertise of agencies and the experience they develop in administering a complex regulatory scheme. See, *e.g.*, *Gonzales*, 546 U.S. at 256 (noting that an agency's interpretation often reflects "considerable experience and expertise * * * acquired over time"); *Thomas Jefferson Univ.*, 512 U.S. at 512 (explaining that "broad deference is all the more warranted when * * * the regulation concerns 'a complex and highly technical regulatory program'") (quoting *Pauley*, 501 U.S. at 697). Agencies employ specialized staff and can engage in the type of broad factual inquiry that may be necessary to a well-informed resolution of a policy dispute. The choice between competing interpretations of ambiguous language often "turn[s] upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency * * * possesses," but a court does not. *Long Island Care*, 551 U.S. at 167-168.

Petitioner asserts (Br. 42-43) that agency expertise is irrelevant to the questions currently governed by *Seminole Rock* deference. That is incorrect. FDA, for example, routinely receives *Seminole Rock* deference for its interpretation of regulations implicating the agency's scientific knowledge. See, *e.g.*, *Actavis Elizabeth LLC* v. *United States FDA*, 625 F.3d 760, 763 (D.C. Cir. 2010) (deferring to the agency's understanding of whether a particular compound should be treated as a single new "active moiety," where it consists of a previously approved moiety joined by a non-ester covalent bond to a lysine group) (quoting 21 C.F.R. 314.108(a)).

The Nuclear Regulatory Commission likewise commonly receives deference. See, *e.g.*, *McMunn* v. *Babcock & Wilcox Power Generation Grp., Inc.*, 869 F.3d 246, 260-262 (3d Cir. 2017) (deferring to the agency's interpretation of the term "'restricted area'" in a regulation governing radioactive emissions from "a restricted area") (citation omitted), cert. denied, 138 S. Ct. 1012 (2018). Those and similar disputes plainly implicate an agency's scientific and technical expertise, which a generalist court cannot match.

d. Finally, *Seminole Rock* deference, when appropriately limited, can make agency guidance more reliable for regulated parties and thus foster regulatory certainty and predictability. As this Court has explained, the purpose of an interpretive rule is to set forth "the agency's construction of the statutes and rules which it administers." *Guernsey Mem'l Hosp.*, 514 U.S. at 99 (quoting, indirectly, *APA Manual* 30 n.3). Regulated parties may then rely on the agency's guidance about its regulations, rather than having to conduct their own de novo analysis of those regulations and then predict whether or not a court will agree. *Seminole Rock* thus can provide regulated parties with a measure of certainty that the agency's interpretation will not be lightly set aside later by a reviewing court. Indeed, in some statutes, Congress has mandated that regulated parties cannot be held liable for complying in good faith with agency guidance. See, *e.g.*, *Mortgage Bankers*, 135 S. Ct. at 1209 (discussing safe-harbor provision in the FLSA); *Ford Motor Credit Co.*, 444 U.S. at 566-567 (discussing safe-harbor provision in the Truth in Lending Act, 15 U.S.C. 1640(f)). *Seminole Rock* deference serves a similar function.

Petitioner argues (Br. 37) that a regulated party actually has less certainty because it can only read the

regulation and "make a judgment about [its] best interpretation," without any confidence that the "best" interpretation will prevail in judicial review. But that provides an incomplete picture, because a regulated party that wishes to conform its conduct to a regulation also can read the agency's guidance, and make a judgment about whether the agency's interpretation is a consistent, reasonable resolution of genuine ambiguity in the regulation. The *Seminole Rock* regime therefore can provide more stability and predictability than one in which the meaning of a regulation must be determined de novo in every judicial proceeding.

B. Petitioner Fails To Offer Sufficient Special Justifications For Overruling, Rather Than Narrowing, The Decisions

This Court requires a "'special justification'" to overrule one of its precedents, "not just an argument that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (citation omitted). For the reasons already explained, the United States agrees that *Seminole Rock* deference should be narrowed in important respects. But those concerns do not justify overruling the doctrine at this late date, more than seventy years after the APA's enactment and after this Court has repeatedly applied and reaffirmed the doctrine.

The "special justifications" petitioner identifies (Br. 47-48) simply restate his argument that *Seminole Rock* and *Auer* were wrongly decided. He does not argue that the doctrine has proven to be "unworkable or confusing." *Patterson*, 491 U.S. at 173. He invokes changed circumstances since 1945, but fails to explain which aspects of modern administrative government he finds "far broader" (Pet. Br. 54) than the regulations at issue

in *Seminole Rock*, which this Court described as bringing "the entire economy of the nation under price control" during a war, *Seminole Rock*, 325 U.S. at 413. And the fact that *Seminole Rock* predated the APA (Pet. Br. 53) is not a compelling reason to overrule it now.

Finally, petitioner briefly contends (Br. 45) that *Seminole Rock* deference is inconsistent with "separation-of-powers principles" because its "practical effect is to vest in a single branch the law-making and law-interpreting functions." But *Seminole Rock* deference does not result in an admixture of "legislative" and "judicial" functions in the constitutional sense. As Justice Scalia explained for the Court, "[a]gencies make rules * * * and conduct adjudications * * * and have done so since the beginning of the Republic. These activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'" *City of Arlington*, 569 U.S. at 304-305 n.4 (quoting U.S. Const. Art. II, § 1, Cl. 1); see *Bowsher* v. *Synar*, 478 U.S. 714, 733 (1986); *INS* v. *Chadha*, 462 U.S. 919, 953 n.16 (1983). Petitioner's reliance on *Chadha* (Br. 45) is thus misplaced. Executive agencies do not exercise "legislative Powers," U.S. Const. Art. I, § 1, when they exercise statutory rulemaking authority. And of course it does not violate the separation of powers for an executive agency to exercise different types of executive power.

Petitioner's separation-of-powers argument also cannot easily be cabined to *Seminole Rock*. Congress has authorized numerous agencies to both make rules and interpret those rules in adjudication. Indeed, "[u]nder most regulatory schemes, rulemaking, enforcement, and adjudicative powers are combined in a single administrative authority." *Martin*, 499 U.S. at 151 (citing, as examples, the Federal Trade Commission, 15 U.S.C.

41 *et seq.*; the Securities and Exchange Commission, 15 U.S.C. 77s-77u; and the Federal Communications Commission, 47 U.S.C. 151 *et seq.*). And this Court has rejected constitutional challenges to those arrangements. See *FTC* v. *Cement Inst.*, 333 U.S. 683, 702 (1948); cf. *Marcello* v. *Bonds*, 349 U.S. 302, 311 (1955). Moreover, accepting the proposition that the separation of powers forbids Congress from authorizing a single governmental entity to be the interpreter of its own rules arguably would extend well beyond *Seminole Rock*. It is not clear, for instance, that federal courts could authoritatively construe ambiguities in the judicial rules they promulgate under that view.

In seeking this Court's review, petitioner contended that *Seminole Rock* deference "represents a transfer of judicial power to the Executive Branch." Pet. 16 (citation omitted). Petitioner has abandoned that argument, and the Court should not address it. In any event, courts routinely defer when a constitutional or statutory provision vests discretion in another Branch. See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."); *e.g.*, *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2574 (2014); *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009). If this Court retains *Seminole Rock* deference, then it is concluding, at least as a matter of *stare decisis*, that Congress intended to vest discretion in agencies to resolve ambiguities in their regulations. And on that premise, when a court applies *Seminole Rock*, it is exercising its "judicial Power" rather than transferring it. U.S. Const. Art. III, § 1; see 5 U.S.C. 706.

III. THE JUDGMENT SHOULD BE AFFIRMED

The court of appeals applied *Seminole Rock* deference in this case without observing the limitations that should properly govern the doctrine. Indeed, this case illustrates how courts have turned to *Seminole Rock* unnecessarily, without applying the traditional tools of construction. But the judgment should nonetheless be affirmed because the interpretation the Board applied and the Federal Circuit endorsed is the only reasonable interpretation. At the least, it is the *most* reasonable one.

A. As explained above (see pp. 8-9, *supra*), the VA's regulations distinguish between *reopening* a prior claim for benefits on the basis of "new and material evidence" and *reconsidering* a claim on the basis of "relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim." 38 C.F.R. 3.156(a) and (c)(1). When a claim is *reopened* and then granted, the veteran is generally entitled to benefits from the time the VA received the claim to reopen or the date entitlement arose, whichever is later. 38 C.F.R. 3.400(q)(2). By contrast, when a claim is *reconsidered* and then granted, the veteran is generally entitled to benefits from the time the VA received the previously decided claim or the date entitlement arose, whichever is later. 38 C.F.R. 3.156(c)(3).

In practice, Section 3.156(c) mandates an earlier effective date for a benefits award when "the veteran's claim was originally denied due to error or inattention on the part of the government," as where the VA fails to consider pertinent service department records that existed at the time of the original denial. *Sears* v. *Principi*, 349 F.3d 1326, 1331 (Fed. Cir. 2003), cert. denied, 541 U.S. 960 (2004). Section 3.156(c) thus serves to "ensure[] that a veteran is not denied benefits due to an

administrative error," by placing the veteran in "the position" in which "he would have been had the VA considered the relevant service department record before the disposition of his earlier claim." *Blubaugh* v. *McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014).

Here, the VA correctly determined that the additional service department records at issue in 2006 were not "relevant," 38 C.F.R. 3.156(c)(1), to the agency's 1983 denial of petitioner's claim for benefits for PTSD. Pet. App. 42a-43a. In the original 1983 decision, it was undisputed that petitioner participated in Operation Harvest Moon during the Vietnam War. His claim was denied, however, because notwithstanding such participation, "there was no diagnosis of PTSD" at the time, and such a diagnosis was a prerequisite to an award of benefits. *Id.* at 42a. The additional service department records at issue in 2006 do not show that he had such a diagnosis as of 1983. Instead, they simply further confirm what no one disputed—that petitioner had participated in Operation Harvest Moon. See pp. 8-10, *supra*. The psychiatrist who examined him in 1983 already had documented that fact, even while concluding that petitioner did not suffer from PTSD. See J.A. 11-13. The additional service records thus were entirely irrelevant to the dispositive defect in petitioner's 1983 claim—the lack of a diagnosis of PTSD. Indeed, it is undisputed that the VA would have denied the benefits for the same reason in 1983 even if it had considered the additional records.

B. The court of appeals affirmed after finding the term "relevant" in 38 C.F.R. 3.156(c)(1) ambiguous and deferring to the VA's interpretation. Pet. App. 14a-19a. The court reached the correct result, but it was unnecessary to apply *Seminole Rock* deference. Section 3.156(c)(1) is not ambiguous.

The text of the regulation favors the VA's interpretation. The ordinary meaning of "relevant" is "[h]aving a bearing on or connection with the matter at hand." *American Heritage Dictionary of the English Language* 1483 (5th ed. 2016); see 13 *Oxford English Dictionary* 561 (2d ed. 1989). In legal usage, the term likewise ordinarily means "tending to prove or disprove a matter in issue." *Black's Law Dictionary* 1481 (10th ed. 2014); cf. Fed. R. Evid. 401. In Section 3.156(c)(1), the "matter at hand" to which the additional records must be relevant is whether to reconsider the VA's prior decision denying the veteran's claim. That is the most natural reading of the first sentence of the regulation, which contemplates that the VA will "reconsider the claim" only if the VA "receives or associates with the claims file relevant" additional records. 38 C.F.R. 3.156(c)(1).

The context and logic of the regulation also compel that reading. As explained above, the hallmark of reconsidering (as distinct from reopening) a prior claim is that the VA concludes that its prior decision on the claim was incorrect *ab initio*—*i.e.*, that the VA would have reached a different result at the time of its prior decision had it considered the additional records. Cf. 38 C.F.R. 3.156(c)(2) (providing that the VA will not reconsider a claim on the basis of "records that VA could not have obtained when it decided the claim"). Therefore, to be "relevant" for purposes of reconsideration, the additional records must speak to the basis for the VA's prior decision.

That reading is confirmed by an adjacent provision. Section 3.156(c)(3) states that an "[a]n award" in a case the VA reconsiders is retroactive only if the award is "made *based all or in part on* the records identified by paragraph (c)(1)." 38 C.F.R. 3.156(c)(3) (emphasis

added). Paragraph (c)(1) is the provision requiring "relevant" additional records for reconsideration. 38 C.F.R. 3.156(c)(1). Read together, the two paragraphs demonstrate that Section 3.156(c) "only applies 'when VA receives official service department records that were unavailable at the time that VA previously decided a claim for benefits and *those records lead VA to award a benefit that was not granted in the previous decision.*'" *Blubaugh*, 773 F.3d at 1314 (citation omitted). When service department records are duplicative of evidence already submitted as part of the initial claim, any award of benefits generally would not be "based all or in part on" those service department records.

The two additional service records at issue here are not relevant to the VA's prior decision denying benefits, because in that decision, all acknowledged that petitioner participated in Operation Harvest Moon, which was the only issue that the records addressed. The VA's denial, in contrast, was based on the entirely separate issue of whether petitioner had been diagnosed with PTSD, which the records do not address. As the Board explained, the records "skip[ped] this antecedent" issue and instead "address[ed] the next * * * requirement" for his claim, "a traumatic event during service." Pet. App. 42a.

C. Petitioner contends (Br. 55-61) that the "best interpretation" of Section 3.156(c) is that additional service records are "'relevant'" as long as they "support any element of a veteran's claim for benefits." But that reading makes no sense in context. On petitioner's view, the VA would be required to reconsider its prior decision on a claim whenever a claimant submits records that support any element of that claim, even if the additional records are in fact *irrelevant* to the VA's ultimate conclusion in its prior decision. Here, for example, the prerequisite

to disability benefits that petitioner's additional records addressed—whether petitioner had experienced an in-service stressor during his service in Operation Harvest Moon (see Pet. Br. 58 n.16)—was undisputed and, in light of the absence of a PTSD diagnosis, did not affect the agency's decision. See Pet. App. 42a-43a; see also *id.* at 18a (whether petitioner "was exposed to an in-service stressor * * * was never at issue in this case"). The VA thus determined that the records did not address any fact that "is *of consequence* in determining the action." Pet. Br. 57 (quoting Fed. R. Evid. 401(b)) (emphasis added).

Petitioner also contends (Br. 58) that the VA's interpretation collapses any distinction between "relevant" records under Section 3.156(c)(1) and "material" evidence under Section 3.156(a). That is incorrect. For purposes of reopening a claim, the regulation defines "material" evidence as "existing evidence that * * * relates to an unestablished fact necessary to substantiate the claim." 38 C.F.R. 3.156(a). Unlike the "relevant official service department records" required to warrant reconsideration, 38 C.F.R. 3.156(c)(1), "material" evidence under Section 3.156(a) need not suggest that the VA's prior decision on the claim was incorrect at the time. Section 3.156(a) is thus broader than Section 3.156(c)(1) in two ways: the claimant can submit any kind of evidence (not merely service records), and he can submit evidence that may warrant a different decision now without questioning any previous decision. The VA reasonably chose two different adjectives.

But even assuming the VA's interpretation gives the terms the same meaning, that is hardly strange. When describing evidence, the terms "material" and "relevant" are not substantially different. See *Black's Law Dictionary* 1124, 1481 (cross-referencing the definition

of "material" in the definition of "relevant," and vice versa). Petitioner invokes (Br. 58) the canon that different terms should carry different meanings, but the different meaning that petitioner strains to attribute to "relevant"—*i.e.*, records supportive of "any element of a veteran's claim" (Br. 56)—is not plausible here. That interpretation would make it easier for a veteran to establish a basis for reconsideration than reopening—even though reconsideration can be more favorable than reopening because it can lead to the award of retroactive benefits. Put differently, even if the service department records at issue here had been considered in 1983, petitioner still would have been denied benefits at that time based on the lack of any diagnosis of PTSD. Petitioner thus seeks to be placed in a *better* position than he would have occupied if those service department records had been considered by the VA from the outset. That result does not make any sense, and the court of appeals should have rejected it without needing to resort to *Seminole Rock* deference.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 2019

APPENDIX

1. 5 U.S.C. 551 provides in pertinent part:

Definitions

For the purpose of this subchapter—

* * * * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

* * * * *

2. 5 U.S.C. 553 provides:

Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required

by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

3. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

4. 38 U.S.C. 7292 provides in pertinent part:

Review by United States Court of Appeals for the Federal Circuit

(a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation (other than a refusal to review the schedule of ratings for disabili-

ties adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts.

* * * * *

(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual de-

termination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

(e)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Appeals for Veterans Claims is not in accordance with law, to modify or reverse the decision of the Court of Appeals for Veterans Claims or to remand the matter, as appropriate.

(2) Rules for review of decisions of the Court of Appeals for Veterans Claims shall be those prescribed by the Supreme Court under section 2072 of title 28.

5. 38 C.F.R. 3.156 (2018) provides:

New and material evidence.

(a) *General.* A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

(Authority: 38 U.S.C. 501, 5103A(f), 5108)

(b) *Pending claim.* New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed (including evidence received prior to an appellate decision and referred to the agency of original jurisdiction by the Board of Veterans Appeals without consideration in that decision in accordance with the provisions of § 20.1304(b)(1) of this chapter), will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period.

(Authority: 38 U.S.C. 501)

(c) *Service department records.* (1) Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section. Such records include, but are not limited to:

(i) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;

(ii) Additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records; and

(iii) Declassified records that could not have been obtained because the records were classified when VA decided the claim.

(2) Paragraph (c)(1) of this section does not apply to records that VA could not have obtained when it decided the claim because the records did not exist when VA decided the claim, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the respective service department, the Joint Services Records Research Center, or from any other official source.

(3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

(4) A retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly, except as it may be affected by the filing date of the original claim.

(Authority: 38 U.S.C. 501(a))

6. 38 C.F.R. 3.304(f) provides:

Direct service connection; wartime and peacetime.

(f) *Posttraumatic stress disorder.* Service connection for posttraumatic stress disorder requires medical evidence diagnosing the condition in accordance with § 4.125(a) of this chapter; a link, established by medical evidence, between current symptoms and an in-service stressor; and credible supporting evidence that the claimed in-service stressor occurred. The following provisions apply to claims for service connection of posttraumatic stress disorder diagnosed during service or based on the specified type of claimed stressor:

(1) If the evidence establishes a diagnosis of posttraumatic stress disorder during service and the claimed stressor is related to that service, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

(2) If the evidence establishes that the veteran engaged in combat with the enemy and the claimed stressor is related to that combat, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

(3) If a stressor claimed by a veteran is related to the veteran's fear of hostile military or terrorist activity and a VA psychiatrist or psychologist, or a psychiatrist

or psychologist with whom VA has contracted, confirms that the claimed stressor is adequate to support a diagnosis of posttraumatic stress disorder and that the veteran's symptoms are related to the claimed stressor, in the absence of clear and convincing evidence to the contrary, and provided the claimed stressor is consistent with the places, types, and circumstances of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor. For purposes of this paragraph, "fear of hostile military or terrorist activity" means that a veteran experienced, witnessed, or was confronted with an event or circumstance that involved actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others, such as from an actual or potential improvised explosive device; vehicle-imbedded explosive device; incoming artillery, rocket, or mortar fire; grenade; small arms fire, including suspected sniper fire; or attack upon friendly military aircraft, and the veteran's response to the event or circumstance involved a psychological or psycho-physiological state of fear, helplessness, or horror.

(4) If the evidence establishes that the veteran was a prisoner-of-war under the provisions of § 3.1(y) of this part and the claimed stressor is related to that prisoner-of-war experience, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

(5) If a posttraumatic stress disorder claim is based on in-service personal assault, evidence from sources other than the veteran's service records may corroborate the veteran's account of the stressor incident. Examples of such evidence include, but are not limited to: records from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, or physicians; pregnancy tests or tests for sexually transmitted diseases; and statements from family members, roommates, fellow service members, or clergy. Evidence of behavior changes following the claimed assault is one type of relevant evidence that may be found in these sources. Examples of behavior changes that may constitute credible evidence of the stressor include, but are not limited to: a request for a transfer to another military duty assignment; deterioration in work performance; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; or unexplained economic or social behavior changes. VA will not deny a posttraumatic stress disorder claim that is based on in-service personal assault without first advising the claimant that evidence from sources other than the veteran's service records or evidence of behavior changes may constitute credible supporting evidence of the stressor and allowing him or her the opportunity to furnish this type of evidence or advise VA of potential sources of such evidence. VA may submit any evidence that it receives to an appropriate medical or mental health professional for an opinion as to whether it indicates that a personal assault occurred.

7. 38 C.F.R. 3.400 provides in pertinent part:

General

Except as otherwise provided, the effective date of an evaluation and award of pension, compensation or dependency and indemnity compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is the later.

(Authority: 38 U.S.C. 5110(a))

* * * * *

(q) ***New and material evidence (§ 3.156) other than service department records*—(1) *Received within appeal period or prior to appellate decision.*** **The effective date will be as though the former decision had not been rendered. See §§ 20.1103, 20.1104 and 20.1304(b)(1) of this chapter.**

(2) ***Received after final disallowance.*** **Date of receipt of new claim or date entitlement arose, whichever is later.**

* * * * *

8. 38 C.F.R. 4.126 (1983) provides:

Substantiation of diagnosis.

It must be established first that a true mental disorder exists. The disorder will be diagnosed in accordance with the APA manual. A diagnosis not in accord with this manual is not acceptable for rating purposes

and will be returned through channels to the examiner. Normal reactions of discouragement, anxiety, depression, and self-concern in the presence of physical disability, dissatisfaction with work environment, difficulties in securing employment, etc., must not be accepted by the rating board as indicative of psychoneurosis. Moreover, mere failure of social or industrial adjustment or the presence of numerous complaints should not, in the absence of definite symptomatology typical of a psychoneurotic or psychophysiologic disorder, become the acceptable basis of a diagnosis in this field. It is the responsibility of rating boards to accept or reject diagnoses shown on reports of examination. If a diagnosis is not supported by the findings shown on the examination report, it is incumbent upon the board to return the report for clarification.

9. 38 C.F.R. 4.127 (1983) provides:

Mental deficiency and personality disorders.

Mental deficiency and personality disorders will not be considered as disabilities under the terms of the schedule. Attention is directed to the outline of personality disorders in the APA manual. Formal psychometric tests are essential in the diagnosis of mental deficiency. Brief emotional outbursts or periods of confusion are not unusual in mental deficiency or personality disorders and are not acceptable as the basis for a diagnosis of psychotic reaction. However, properly diagnosed superimposed psychotic reactions developing after

enlistment, i.e., mental deficiency with psychotic reaction or personality disorder with psychotic reaction, are to be considered as disabilities analogous to, and ratable as, schizophrenic reaction, unless otherwise diagnosed.